



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CRIMINAL APPEAL NO. 56 OF 2017

JOHN MBURU WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the original conviction and sentence in **Githunguri Chief Magistrate's Court Criminal Case No. 261 of 2016 by Hon. C. Kutwa P M on 16/1/17**)*

J U D G M E N T

1. **John Mburu Wambui**, the Appellant, was charged with the offence of possession of narcotic drugs contrary to section 3(2)(a) of the **Narcotic and Psychotropic Substances Control Act Cap 245, Laws of Kenya**. Particulars of the offence were that on the **18th day of March 2016**, at around **1202 hours**, at **Githunguri Sub – County** within **Kiambu County**, was found in possession of about **4.9 kilograms of Bhang** with a street value of KShs, five thousands (**5000/=**) which was not in a medical preparation form.
2. After full trial, he was convicted and sentenced to two **(2) years imprisonment**.
3. Aggrieved by the conviction and sentence he now Appeals on grounds that:
 - He was a framed up.
 - PW3 Ip. Gitau took away his wife and they cohabited as couple. Therefore a grudge existed between them.
4. Brief facts of the case were that on the 18th March, 2016, PW3 No. 235502 Inspector John Gitau the Deputy Officer commanding Githunguri Police Station acting on information received went to Githunguri Stadium in Company of PW1, No. 69475, P.C. Johnson Manyo and PW2 No. 93402 P.C. Sospeter Nganga where they found the Appellant. They searched him but did not recover anything. They moved to his house where they recovered 4.9 kilograms of some plant material. As a result they charged him with the offence.
5. In his defence, the Appellant stated that on the material date he was at his shop when PW3 went and questioned him about the report his wife made to the police. It had come to his knowledge that his wife used to wash clothes for PW3. Ten (10) minutes later some four (4) police officers arrived and arrested him. They took him to the police station where he was placed in custody. Later he took the police to his house. A search was carried out and nothing was recovered. He saw the plant material in court.
6. The learned trial Magistrate considered evidence adduced and found that the appellant did not dispute ownership of the house therefore he believed that the plant material was found under his bed. He noted

that the substance analyzed was Cannabis therefore the prosecution proved the case beyond reasonable doubt.

7. At the hearing of the appeal, the Appellant canvassed the appeal by way of written submissions where he stated that the charges were trumped up following a grudge that existed between him and the Deputy Officer Commanding the Station, Githunguri, PW3. He also pointed out glaring contradictions in evidence adduced by prosecution witnesses that was overlooked by the trial court.

8. In response the state through learned counsel **Ms. Ongake** opposed the appeal. She submitted that if indeed there was a grudge between the Appellant and PW3 he would have raised the issue in cross examination instead of waiting to raise it as an afterthought in his defence. She argued that the offence was proved to the required standard.

9. This being the first appellate court, I am duty bound to subject evidence adduced at trial to a fresh and exhaustive analysis while bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. (See **Okeno vs. Republic (1972) EA 32**).

10. First and foremost it is important to point out that **Cap 245 of Laws of Kenya (The Dangerous Drugs Act)** was repealed by section **88** of the **Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994**.

11. The Appellant faced a charge of being in possession of narcotic drugs. Particulars of the offence stipulate that he possessed 4.9 kilograms of Bhang. Looking at the first schedule of the **Narcotic Drugs and Psychotropic Substances (Control) Act**, Bhang is not listed. However, the report by the government analyst adduced in evidence indicate that the plant material that was submitted to the chemist for analysis was Cannabis which falls under the first schedule of the **Narcotic Drugs and Psychotropic Substances (Control) Act**.

12. According to the evidence of PW3, he acted on information received. At the point of arresting the Appellant he was not in possession of anything. It is not denied that the Appellant led the police to his house. In their testimonies, PW1 No. 69475 P.C. Johnstone Manyo stated that they found the plant material in a yellow paper bag that was inside a bucket that was in the bedroom. PW2 No. 93402 P.C. Sospeter Nganga stated that the plant material was under the bed. PW3 stated that they recovered a Kiondo under the bed that had the plant material.

13. What was submitted to the government chemist was some plant material that weighed 4.9 kilograms in a greenish gunny bag. PW4 No. 87913 P.C. George Kamau who submitted the exhibit to the government chemist for analysis stated that he was given the exhibit by PW3 Ip. John Gitau. No explanation was given as to what happened such that the exhibit ended up in a gunny bag that was not mentioned by any of the witnesses. The question begging is if indeed what was taken to the government chemist is what was recovered.

14. There are glaring contradictions as to where the plant material was recovered from and in what container. In the case of **Twehangane Alfred –vs- Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** the court of appeal addressed the issue of contradictions thus:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

15. The major issue in the case is the fact of the Appellant having been found in possession of narcotic drugs. How the plant material was recovered goes to the core of the matter. There is contradictory evidence as to where and in what circumstances it was found. Witnesses who testified as to the recovery were experienced police officers who could not be expected to give contradictory evidence as they did.

16. In the case of **Ndung'u Kimani V Republic (1976 – 80) IKLR 1442** the Court of Appeal held:

“that the witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straightforward person, or raise suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which make it unsafe to accept his evidence.”

17. The impression created by the police officers who testified suggested that they may have been untruthful. Therefore the contradictions that emerged cannot be overlooked. A doubt was created if indeed the Appellant was found in possession of the Cannabis Sativa.

18. In the premises the conviction was unsafe which cannot be allowed to stand. In the result, the Appeal is allowed, the conviction is quashed and sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

19. It is so ordered.

Dated, Signed and Delivered at Kiambu this 15th day of June, 2017.

L. N. MUTENDE

JUDGE